

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

EDWIN D. JOHNSON,

Defendant-Appellant.

UNPUBLISHED

October 15, 2002

No. 234932

Wayne Circuit Court

LC No. 00-009297

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of assault with a dangerous weapon, MCL 750.82. He was sentenced to one to four years' imprisonment for the felonious assault conviction, to be served consecutively to two years' imprisonment for a conviction for possession of a firearm during the commission of a felony, MCL 750.227b, in a separate, but consolidated, case. Defendant appeals as of right. We affirm, but remand for correction of the judgment of sentence regarding the felonious assault sentence.

Defendant argues that his conviction should be reversed because the prosecution failed to prove beyond a reasonable doubt that he used a dangerous weapon when he assaulted the victim in this case. We disagree.

In reviewing the sufficiency of the evidence presented in a bench trial, an appellate court views the evidence de novo and in the light most favorable to plaintiff to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), affirmed 466 Mich 39 (2002). A trier of fact may make reasonable inferences from evidence in the record but may not make inferences completely unsupported by any direct or circumstantial evidence. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). To determine if an object is a dangerous weapon is to ask whether the instrument was employed as a weapon, and when so employed, whether it was dangerous or deadly. *People v Goolsby*, 284 Mich 375, 378; 279 NW 867 (1938).

Defendant drove to Brandon Pritchard's home on June 27, 2000, with his girlfriend, Terilyn Burton, and Burton's brother, Anthony Pickens. Defendant had an argument with Pritchard about Burton. Defendant testified that, as Pritchard began to walk away from the car, defendant got out of his vehicle and hit Pritchard hard on the back of the head with his fist.

Pritchard testified that, during his argument with defendant, defendant began hitting Burton with the club (a metal locking mechanism for automobiles). Pritchard then walked away from the car and was about ten to fifteen feet away from the car when he was struck in the back of the head. Immediately after being struck, Pritchard turned and saw defendant running toward the car with the club in his hand. Pritchard went to the hospital and his injuries required four staples in the back of his head. Defendant denied that he intended to hurt Pritchard, but admitted that he was frustrated and angry because Burton admitted to being involved with Pritchard. Also, defendant testified that he did not own the club.

Viewing this evidence in a light most favorable to the prosecution, we conclude that the prosecution introduced sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that defendant assaulted Pritchard with a dangerous weapon. Though defendant argues that Pritchard did not see defendant strike him, and denies having or owning a club, the trial court specifically found defendant's testimony incredulous. Credibility is a matter for the trier of fact to ascertain. We will not resolve it anew. *Vaughn, supra* at 380. Here, a rational trier of fact could have found that defendant used the club when attacking Pritchard. Pritchard had earlier seen defendant hitting Burton with the club, and, after being struck, saw defendant running away holding the club. The injury to the back of Pritchard's head required four staples, and the trial court could have found this injury consistent with being struck by a metal object rather than defendant's fist.

Whether the club is a dangerous weapon is a question for the trier of fact. *People v Rivera*, 120 Mich App 50, 56; 327 NW2d 386 (1982). The test to determine if an object is a dangerous weapon is whether the instrument was employed as a weapon, and when so employed, whether it was dangerous or deadly. *Goolsby, supra* at 378. Pritchard required four staples to the back of the head as of result of being struck with the club, which is partially made of metal. Accordingly, a rational trier of fact could have found the club was employed as a weapon, and when so employed, was a dangerous or deadly weapon.

Defendant also argues that the trial court erred in ordering that defendant's felonious assault sentence in this case is to run consecutively to his felony-firearm sentence in a consolidated case. The prosecutor concedes error on this point, and correctly so. By the terms of the felony-firearm statute, MCL 750.227b, the mandatory two-year sentence is to be served prior to and consecutive to the sentence imposed for any underlying felony, not for unrelated, separately committed felonies. Indeed, the conviction in this case did not involve a firearm nor was it the predicate offense for the felony-firearm conviction in the consolidated case. See *People v Hunter*, 141 Mich App 225, 233; 367 NW2d 70 (1985).

Defendant's conviction and sentence are affirmed, and the case is remanded to the trial court for correction of the judgment of sentence to reflect that the felonious assault sentence is to

run concurrently with the felony-firearm sentence in the consolidated case. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Patrick M. Meter